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PETITIONER'S REPLY

IN THE

Supreme Court of the United States

October Term, 1969

NO. 616

ROBERT L. HATCHETT, JR., *Petitioner*

v.

C. W. WILLIAMS, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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Respondent's Reply to the Petition for Certiorari presents two questions not raised by the Petition:

1. Whether Petitioner can rely on the defense of illegality in denying liability.

2. Whether there are adequate and independent grounds of state law that will support the judgment.

I

In §I(D), of his Reply to Petition for Writ of Certiorari, Respondent has argued that the Supreme Court should not review this case because the illegality defense has not been favored by this Court. The limitations placed on the use of the illegality defense should not apply in cases where, as in this case, the Seller has refused the return of goods delivered pursuant to an illegal contract.

In the case relied upon by Respondent Williams, *Kelly v. Kosuga,* 358 U.S. 516 (1959), the Court made clear that limitations were placed on the illegality defense because of the Court's policy against unjust enrichment. In resolving questions concerning the illegality defense, the Court suggested guidance by the general policy "of preventing people from getting other people's property for nothing when they purport to be buying it", 358 U.S. at 520-521, quoting from *Continental Wallpaper Company v. Louis Voight & Sons Company,* 212 U.S. 227, 271 (1909). In the instant case, no attempt has been made to deprive Respondent Williams of his property without payment. To the contrary, an attempt was made to return the goods, but Respondent Williams refused to accept them. Under these facts, the equities between the parties should not bar Supreme Court review of this case as in *Kelly v. Kosuga,* and similar cases.

The *Kelly* case also made clear that the illegality defense would be available in cases where a judgment for the Seller would be enforcing the precise conduct forbidden by the Anti-Trust Act. The Court held that such would be the effect of denying the illegality defense to an innocent purchaser where high prices have been fixed by a combination of sellers. *Continental Wallpaper Com-*

pany v. Louis Voight & Sons Company, 212 U.S. 227 (1909). The same effect would occur in the instant case if judgment is allowed against an innocent guarantor of a contract in which the goods were delivered pursuant to a resale price maintenance scheme. Petitioner Hatchett, a minority shareholder in a close corporation, should not be made responsible for the guarantee of illegal contracts of that corporation. Under the facts of this case, where Petitioner is a mere guarantor of an illegal contract, and where Petitioner has in vain attempted to redeliver goods delivered under that contract, the illegality defense should be applicable.

II

In §II of Respondent's Reply to the Petition for Writ of Certiorari, Respondent argued that the Supreme Court should not review this case because of adequate and independent state grounds that would support the judgment. In support of this argument, Respondent presented Texas authorities in regard to the defense of illegality. The lower court did not follow the authorities cited by Respondent in its decision below, and in fact, the decision below rested entirely on the federal question of whether the contract or the price-fixing agreement.

The authorities cited by Respondent in presenting the adequate state grounds argument are not directly in point on the question of whether illegality of the principal contract also renders a guaranty void. Under Texas Law, any circumstance that renders the principal obligation unenforceable makes a guaranty contract unenforceable. 27 Tex. Juris 2d "Guaranty", §46 at 312; *Fuqua v. Pabst Brewing Company*, 38 S.W. 28, (Texas 1896); *Columbia Carriage Company v. Hatch*, 47 S.W. 288 (Tex. Civ.

App.—1898, writ denied). At any rate, this question of state law should properly be decided by a state court on remand. One of the leading authorities on federal procedure has stated the matter as follows:

> "But if the state court has decided the case entirely on the federal question presented, the Supreme Court can review, even though there was a state question in the case which could have been a basis for the decision. In such a case, if the state's court resolution of the federal question, is erroneous, the Supreme Court will remand the Court to the state court which can then pass on the state question."
>
> Wright, Federal Courts,, §107 at 426-427 (1966 ed.).

Since the state court did not discuss Texas Law on the illegality defense, there is no adequate state ground presented to bar review of the present case. See also *International Steel & Iron Company v. National Surety Company,* 297 U.S. 657, 665-666 (1936); *Indiana Ex Rel Anderson v. Brand,* 303 U.S. 95, 98-99 (1938).

CONCLUSION

For the foregoing reasons as well as those urged in the Petition, Certiorari should be granted.

Respectfully submitted,

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